No. 14,902

United States Court of Appeals

For the Ninth Circuit

G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, Trustees of John W. Smeed Estate,

Appellants,

vs.

Sam Wahyou, Diamond-S Ranch Co., Sam Wahyou, K. R. Nutting and Thomas G. Lee, as Trustees for the assets of Diamond-S. Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang,

Appellees.

Appeal from the United States District Court for the District of Nevada.

APPELLEES' PETITION FOR REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Albert Lee Stephens and Walter L. Pope, Circuit Judges:

STATEMENT OF REASONS WHY REHEARING SHOULD BE GRANTED.

A rehearing should be granted in this case because the opinion is in error in the following respects:

1. Although the opinion in no uncertain terms holds that there was no fiduciary relationship between Wahyou and the plaintiffs, it erroneously assumes him to be a trustee.

2. Although the opinion states that there was evidence from which the District Court could have found that Wahyou had proved that the transaction whereby he acquired Corbari's stock was fair it made no such finding, in fact the District Court made very specific findings on that matter.

3. Although the District Court's judgment was made pursuant to joint motions for summary judgment, the entire case had actually been submitted for final decision at the pre-trial conference with both sides declaring they had no further evidence to present.

4. Assuming the burden of proving absence of fraud was upon Wahyou, he met that burden when all the facts surrounding the transaction were presented to the District Court and the District Court made findings of fact which are adequately supported by the evidence.

ARGUMENT.

1. ALTHOUGH THE OPINION IN NO UNCERTAIN TERMS HOLDS THAT THERE WAS NO FIDUCIARY RELATIONSHIP BETWEEN WAHYOU AND THE PLAINTIFFS, IT ERRONEOUSLY ASSUMES HIM TO BE A TRUSTEE.

The opinion of this Court, page 5, points out that *"Corbari's interest was not part of the trust over which Wahyou was a trustee.* The Nevada Legis-

lature imposed the duties of a trustee upon the directors of a dissolved corporation with regard to their powers to liquidate the corporate assets, pay creditors and distribute the net proceeds to the shareholders. The Nevada statutes make no mention of any powers over a shareholder's interest, and it seems clear the corporate liquidators have no control over how a particular shareholder deals with his interest. The reasons why a trustee may not purchase trust property at a foreclosure sale are not applicable to what was done by Wahyou in this case. The high fiduciary duties of a trustee are imposed on a director of a dissolved corporation to prevent him from personally profiting rather than obtaining the highest prices in the liquidation of assets for all the shareholders. The corporation is in a vulnerable position during dissolution and liquidation. Undoubtedly it would be improper for a director-trustee to purchase the property of the corporation at a foreclosure sale without the consent of the shareholders. As an individual it would be in his interest to enter a low bid while as a trustee it would be in his interest to receive the highest bid possible. Also a director-trustee would be in a position to decide whether the corporation should redeem its pledge or whether it should be allowed to be sold upon foreclosure. On the other hand, a trustee has no duty to buy one beneficiary's interest for the benefit of other beneficiaries: Wahyou was in no position to decide whether Corbari's interest should be redeemed or sold. Whether Wahyou made a low or a high bid for Corbari's interest did not affect the dissolved corporation's financial position. Wahyou, as a result of the purchase, did not occupy a personal position ad-

verse to his duties as a trustee. He was already both a shareholder-beneficiary and a director-trustee." (Italics ours.)

In a case cited by the Court in its opinion,[1] it was held that "a trust is a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another." As stated by this Court in its opinion, there was no fiduciary relationship between Corbari or his assignee and Wahyou.

Although plaintiffs alleged fraud in connection with the purchase of Corbari's stock by Wahyou, it did so merely by way of reciting a conclusion of law in its amended complaint[2] and there was no dispute whatever as to the facts, which were simply that Corbari had long previously owed the Bank of America over $5,000.00 secured by a pledge of his stock, which plaintiffs well knew, and the bank assigned to Wahyou, who purchased it in at a legally conducted foreclosure sale for the amount owing, with the opportunity open to plaintiffs at all times to purchase the stock themselves.

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[1] *American Bank and Trust Co. v. Lebanon Bank and Trust Co.*, 28 Tenn. App. 618, 192 S.W. 2d 245 (1945).

[2] Transcript, page 31, paragraph 2 of the amended complaint.

2. ALTHOUGH THE OPINION STATES THAT THERE WAS EVIDENCE FROM WHICH THE DISTRICT COURT COULD HAVE FOUND THAT WAHYOU HAD PROVED THAT THE TRANSACTION WHEREBY HE ACQUIRED CORBARI'S STOCK WAS FAIR IT MADE NO SUCH FINDING. IN FACT THE DISTRICT COURT MADE VERY SPECIFIC FINDINGS ON THAT MATTER.

The charge of fraud in connection with the foreclosure sale is contained in the third cause of action. The District Court in its opinion and decision on motions for summary judgment made specific findings as to the fairness of the transaction in the following language:[3]

"Third Cause of Action

This count is based on the proposition that the entire series of acts by which Wahyou obtained the Corbari stock were conceived in fraud, and executed in furtherance thereof. *The Court is unable to find any evidence of fraud* and holds that by virtue of the purchase of the Corbari stock at the sale of pledged property, May 21, 1951, Wahyou became the owner of, and entitled to, all of the benefits represented by the Corbari stock; *that such sale and the acquiring of the Corbari stock by Wahyou,* then a creditor of Corbari to the extent of some $12,000.00, *was but the normal and rational procedure to be followed by one in his position; that in connection therewith he breached no fiduciary relation to the plaintiffs, defendants, or any of the other creditors of the corporation; that the acts complained of were not tinged with fraud as against plaintiffs and/or any of the creditors of the corporation;* and that any

[3]Transcript, page 148, fourth paragraph.

rights that the plaintiffs may have had in or to said stock, or in or to a proportional share in the assets of the corporation were extinguished by sale of pledged property on May 21, 1951."

* * * * * * *

"The Court further finds that there is no proof that Wahyou, at the time of the purchase of the stock at the pledge sale had any knowledge of the Corbari assignment to Lord, as trustee for the Smeed Estate, nor of any representation, true or false, made by Corbari to Lord in connection therewith.

The Court further finds that there was no fraud on the part of any of the defendants named in connection with any of the acts by them performed, as complained of in the complaint, including the dissolution and revival of the corporation, and the acts and transactions in connection with the acquisition of the Corbari stock by Wahyou." (Italics ours.)

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3. **ALTHOUGH THE DISTRICT COURT'S JUDGMENT WAS MADE PURSUANT TO JOINT MOTIONS FOR SUMMARY JUDGMENT, THE ENTIRE CASE HAD ACTUALLY BEEN SUBMITTED FOR FINAL DECISION AT THE PRE-TRIAL CONFERENCE WITH BOTH SIDES DECLARING THEY HAD NO FURTHER EVIDENCE TO PRESENT.**

There was a pre-trial conference in this case and a pre-trial order made pursuant thereto (Transcript, page 127). In this pre-trial order we find the following (page 129):

"Proof

With the exception of proof bearing upon the additional payment of $1,000.00 which the Cor-

baris assert they paid on the Smeed note, all of the proof is now before the Court by way of exhibits agreed in evidence at this pretrial, which exhibits are listed in Schedule 'A' attached hereto and made a part hereof by reference."

* * * * * * *

"Order

Pursuant to discussion and *stipulation of counsel,* and on the basis of the foregoing comment, it is ordered as follows:

1. That the defendants, A. E. Corbari and Marie Corbari, have twenty days within which to submit proof by way of affidavit of the alleged payment of $1,000.00 on the Smeed note.

2. That all of the exhibits referred to in Schedule 'A' be and they hereby are admitted in evidence.

3. That the parties shall have ten days after submission of proof re the $1,000.00 additional payment on the Smeed note to make any additional motions, after which *the matter will be deemed submitted for decision on the record."* (Underscoring and italics ours.)

The evidence as to the $1,000.00 payment was presented on June 3, 1955 (Transcript, page 146, third paragraph) and the decision of the District Court was made August 11, 1955 (Transcript, page 152). It will thus be seen that at the time the opinion and decision on motions for summary judgment were made, all parties had twice stipulated that they had no further evidence to offer and the matter was submitted to the District Court for decision on the

merits.[4] In view of the fact that the matter had been completely submitted to the District Court for decision on the merits, appellees suggest that this Court should consider the decision of the Court below a decision on the merits, as the District Court obviously would arrive at the same decision regardless of whether it was made pursuant to submission at the pre-trial conference or by way of motions for summary judgment.

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4. **ASSUMING THE BURDEN OF PROVING ABSENCE OF FRAUD WAS UPON WAHYOU, HE MET THAT BURDEN WHEN ALL THE FACTS SURROUNDING THE TRANSACTION WERE PRESENTED TO THE DISTRICT COURT AND THE DISTRICT COURT MADE FINDINGS OF FACT WHICH ARE ADEQUATELY SUPPORTED BY THE EVIDENCE.**

According to Professor Wigmore,[5] burden or proof means risk of nonpersuasion in its first meaning, which means (par. 2487) that both parties alike must first satisfy the judge that they have a quantity of evidence fit to be considered. This duty, though determined in the first instance by the burden of proof in the sense of the risk of nonpersuasion, is a distinct

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[4]In *Meikle v. Timken-Detroit Axle Co.*, 44 Fed. Supp. 460, the headnote, fully supported by the text, states:

"1. Patents

Where both parties to patent infringement action moved for summary judgment, court could treat the motions as pre-trial procedure and dispose of all issues upon which the parties had developed their record by admissions of facts and responses thereto, interrogatories and particulars, and issues not fully developed could be separately tried. Federal Rules of Civil Procedure, rules 12(c), 16, 33, 36, 42, 56, 28 U.S.C.A. following section 723c."

[5]Wigmore on Evidence, Vol. 9, Third Edition, Paragraph 2485.

one, for it is a duty towards the judge and the judge rules against the party if it is not satisfied. *Where a party has satisfied this duty towards the judge and the judge has ruled that sufficient evidence has been introduced, the duty has then ended.*

In a case cited by this Court,[6] it is stated:

> "Of course a disputable presumption may be refuted by evidence of the facts, *but it is normally for the trial court to determine whether the proper testimony outweighs the presumption.*" (Italics ours.)

The District Court in this case had before it details and specific evidence as to all the facts and circumstances in connection with the transaction regarding the sale of the stock and has made specific findings thereon. These findings show that Wahyou made a complete disclosure of the facts and there was not the slightest evidence of any fraud, overreaching or unfairness, and after such findings are made the question of burden of proof is no longer of any importance.

Actually, there was no burden of proof upon Wahyou in this case.[7] Where, as in this case, there is no confidential relationship and the plaintiff alleges

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[6] *McDonald v. Hewlett,* 102 Cal. App. 2d 680 at 688, 22 Pac. 2d 83.

[7] 13 Am. Jur. page 962, Par. 1010:

> "In other words, ordinarily, a corporate officer or director has a right to purchase the stock of a shareholder therein the same as any other person has a right to purchase such stock, and there is nothing in the mere fact that the purchaser is an officer or director of the corporation, the shares of which he purchases, from which fraud or unfair dealing may be inferred."

fraud, such fraud is not presumed but the burden of proving the same, either actual or constructive, is upon the person asserting the existence thereof.[8] There was actually no contest as to the facts relating to the purchase of the stock by Wahyou. Where there is no contest as to the facts, findings need not be made, and where the case is submitted on an agreed statement of facts or case stated, findings need not be made.[9]

If the evidence in this case were conflicting and unsatisfactory, the Court could properly reverse and remand with instructions to make essential findings and to hear additional evidence that might be offered, but such reversal and remand is not proper where no issue of fact is presented nor where the record does not contain contradictory evidence.

The Court has noted the case of *Bisbee v. Midland Linseed Products Co.,* 19 Fed. 2d 24, wherein it is held that no trust duty rests upon the directors, officers, majority stockholders or liquidators of a corporation in behalf of any other stockholders with respect to dealings between them in buying or selling stock in the corporation unless some situation exists which makes it inequitable for such officer to buy the stock in question. The facts of the instant case are even further removed from that case in that here

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[8]89 C.J.S. page 1075, Par. 155:
"Fraud, out of which a trust ex malificio arises, is not presumed, and the burden of proving the existence of the fraud, actual or constructive, necessary to give rise to a constructive trust is on the person asserting the existence of such a trust."

[9]*Saltonstall v. Russell,* 152 U.S. 628, 38 L. Ed. 576, 14 Supreme Court 733;
53 Am. Jur. 788.

Wahyou purchased Corbari's interest at a pledge sale rather than directly from Corbari. Since no trust duty exists, there is no reason for placing a burden of proof on Wahyou to prove fairness or lack of misuse of any fiduciary position. At any rate, the burden of proof should not be a problem where the parties stipulate to factual matters and submit the case pursuant thereto.

Rule 52 does not require court to make findings on all facts presented or to make detailed evidentiary findings, but where findings are sufficient to support ultimate conclusion of court, they are sufficient, and it is not necessary for the court to make findings asserting negative of each issue raised, but it is sufficient if special affirmative facts found by court, construed as a whole, negative each rejected contention.[10] Under Rule 52 as amended, if an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. This amendment permits findings of fact and conclusions of law to appear in the trial court's opinion or memorandum.[11]

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[10] *Carr v. Yokohama Specie Bank, Limited, of San Francisco,* C.A. 9th, 1953, 200 F. 2d 251.

[11] *Walker v. Lightfoot,* C.C.A. 9th, 1941, 124 F. 2d 3; Barron and Holtzoff, Federal Practice and Procedure, Vol. 2, page 826, Par. 1128.

CONCLUSION.

It is respectfully submitted that further consideration should be given to the points urged and a rehearing should be granted so as not to unduly prolong this litigation and subject appellees to a bill for costs on appeal where, as in this case, the matter was twice submitted to the District Court with a stipulation that there was no further evidence to be produced—once at the pre-trial conference and again upon motions for summary judgment—and upon the oral argument before this Court both counsel reiterated that neither of them had any further evidence to produce.

We respectfully urge that the Court grant a rehearing and reconsider this matter.

Dated, Stockton, California,
July 2, 1956.

Respectfully submitted,
FORREST E. MACOMBER,
Attorney for Appellees and Petitioners Diamond-S Ranch Co.; Sam Wahyou; A. E. Corbari, Sam Wahyou, K. R. Nutting and Thomas G. Lee, trustees for the assets of Diamond-S Ranch Co.; Thomas G. Lee; Toy Quong; Joe Sin; K. R. Nutting; Yip K. Toon; Herbert Jang, otherwise known as Herbert Jong.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the within petition for rehearing is well founded and that it is not interposed for delay.

Dated, Stockton, California,
July 2, 1956.

FORREST E. MACOMBER,
Attorney for said Appellees and Petitioners.